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THERABODY, INC.
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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **SOUTHERN DIVISION**

13
14 THERABODY, INC., Case No.
15 Plaintiff,
16 v.
17 Defendant.
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COMPLAINT FOR:
(1) Product Disparagement and
Trade Libel (Lanham Act);
(2) False Advertising (Cal. Bus. &
Prof. Code);
(3) Defamation (Common Law);
(4) Trade Libel (Common Law);
(5) Tortious Interference with
Existing and Prospective
Economic Advantage (Common
Law); and
(6) Unfair Competition (Cal. Bus. &
Prof. Code)

25 **JURY TRIAL REQUESTED**
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27
28

Plaintiff THERABODY, INC. ("Therabody"), for its claims for relief against defendant HYPER ICE, INC. ("Hyper Ice"), alleges as follows:

I. NATURE OF ACTION

1. Therabody is a pioneering health and wellness company, known for its
2 cutting-edge performance and recovery technology. This action arises out of
3 defendant Hyper Ice's maliciously false and misleading statements impugning
4 Therabody's products and reputation. Through these false statements, and motivated
5 by animus toward its chief competitor, Hyper Ice intended to cause and has caused
6 damage to Therabody's business and business prospects. As a result, Therabody now
7 asserts claims for product disparagement and trade libel under the Lanham Act,
8 15 U.S.C. § 1125(a), false advertising under Cal. Bus. & Prof. Code § 17500 *et seq.*,
9 common law defamation, trade libel, tortious interference with existing and
10 prospective economic advantage, and unfair competition under Cal. Bus. & Prof.
11 Code § 17200 *et seq.*, as described below.

II. PARTIES

14 2. Therabody is a corporation duly organized and existing under the laws
15 of the State of Delaware, having its principal place of business at 1640 South
16 Sepulveda Boulevard, Suite 300, Los Angeles, California 90025.

17 3. On information and belief, Hyper Ice is a corporation organized and
18 existing under the laws of the State of California, claiming to have its principal place
19 of business at 525 Technology Drive, Suite 100, Irvine, California 92618.

III. JURISDICTION AND VENUE

21 4. This Complaint arises under Section 43(a) of the Lanham Act,
22 15 U.S.C. § 1125(a), as amended, the law of the State of California, and the common
23 law.

24 5. This Court has subject matter jurisdiction over the federal cause of
25 action under 28 U.S.C. § 1331. This Court has subject matter jurisdiction over the
26 state and common law causes of action under 28 U.S.C. § 1337(a) because these
27 claims are so related to the federal claim within the original jurisdiction of this Court
28 that they form part of the same case or controversy.

1 6. This Court has personal jurisdiction over Hyper Ice because it resides in
 2 this District. Moreover, this Court has personal jurisdiction over Hyper Ice because
 3 it conducts business in this District; has purposefully availed itself of the rights and
 4 benefits of California law; and has substantial, continuous, and systematic contacts
 5 with the State of California and this District.

6 7. Venue is proper under 28 U.S.C. § 1331(b)–(d) because Hyper Ice
 7 resides in this District. In addition, Therabody is located in this District. Because
 8 Hyper Ice’s libelous press release and other tortious conduct has caused substantial
 9 harm to Therabody, that harm has occurred in this District. Assignment of this case
 10 to the Southern Division is proper pursuant to General Order 23-15, filed November
 11 29, 2023, because Hyper Ice, the only defendant, resides in the Southern Division.

12 **IV. FACTUAL BACKGROUND**

13 **Therabody’s History of Innovation**

14 8. In the fall of 2007, Therabody founder Dr. Jason Wersland was involved
 15 in a traumatic motorcycle accident that severely damaged his soft tissue. Dr.
 16 Wersland, now a trained chiropractor, surveyed the health and wellness market in
 17 search of some technique or product to alleviate his debilitating pain. He found
 18 nothing.

19 9. Dr. Wersland decided to take matters into his own hands. Curious about
 20 the potential ameliorative effects of vibration on the body, Dr. Wersland began
 21 deconstructing common tools and developed an experimental device that used a
 22 jigsaw as a base motor. By 2008, Dr. Wersland had created a makeshift percussive
 23 therapy device that worked—it relieved the pain that had made his everyday tasks a
 24 struggle. Dr. Wersland knew that his innovative device had the potential to change
 25 the health and wellness industry and help people live better, healthier lives. The
 26 homemade device, which Dr. Wersland began using with his own clients, received
 27 rave reviews and produced tremendous therapeutic results. This device would
 28 eventually become the first “Theragun” product.

1 10. As Dr. Wersland continued to experiment with his innovative device, he
2 discovered that certain depths and speeds of percussion were incredibly effective at
3 easing muscle pain. In 2016, after numerous prototypes and almost a decade after
4 Dr. Wersland developed the first version of his innovative percussive therapy device,
5 the Theragun G1 hit the market. By 2019, Dr. Wersland's percussive therapy devices
6 were used by more than 250 sports teams, as well as physical therapists, trainers, and
7 everyday people worldwide.

8 11. Today, Therabody is a leading wellness technology pioneer that
9 empowers people around the world to live healthier lives. Theragun, the category-
10 defining percussive therapy device, was just the start for Therabody. Therabody has
11 created other innovative, science-backed wellness solutions involving pneumatic
12 compression, electrical stimulation, and vibration therapy.

13 12. To protect these innovations in wellness technology, Therabody has
14 applied for and been issued nearly 600 utility and design patents in the United States
15 and throughout the world, and holds numerous trademark and copyright registrations.
16 Among Therabody's large intellectual property portfolio are multiple utility patents
17 covering novel connector systems for percussive massage devices, including U.S.
18 Patent No. 10,428,850, issued on October 1, 2019 (the "'850 Patent"), and U.S.
19 Patent No. 10,557,490, issued on February 11, 2020 (the "'490 Patent").

Hyper Ice's Bad Faith, Defamatory Press Release

21 13. Hyper Ice is a Therabody competitor. On information and belief, Hyper
22 Ice released its first massage therapy device for the consumer market—the
23 “Hypervolt” product—in 2018, two years after the Theragun was introduced into the
24 market.

25 14. On January 3, 2024, in a blatant, malicious attempt to harm its biggest
26 competitor, Hyper Ice published a knowingly false press release that disparaged the
27 quality of Therabody's products and baselessly accused Therabody of copying Hyper
28 Ice's products. The press release specifically stated:

1 Hyperice made national headlines in 2018, launching the Hypervolt, the
 2 world's first "modern-day" massage gun, featuring a brushless motor
 3 system, variable speed settings, and QuietGlide® technology. ***The***
 4 ***success and rapid scale of the Hypervolt led to an influx of massage***
 5 ***gun brands entering the market to replicate this technology, including***
 6 ***Therabody.***

7 ...
 8 "In 2018, when we launched the Hypervolt at a more consumer-friendly
 9 price point, our business accelerated rapidly – so much so that we began
 10 to see an extraordinary amount of ***Hypervolt knockoffs and imitators***
 11 enter the market," said Jim Huether, CEO of Hyperice. . . . "We will
 12 use the legal system aggressively ***to clean up the percussion market***
 13 ***from imitators and knockoffs who we believe are using Hyperice's IP***
 14 ***in their devices.***"

15 ...
 16 "We will aggressively defend our intellectual property rights and take
 17 all appropriate steps to ensure that our innovative products and
 18 technology are not ***misappropriated by opportunists seeking to knock***
 19 ***us off,***" said Jon Howell, General Counsel at Hyperice.

20 Hyper Ice's January 3, 2024 press release (the "Press Release") is attached hereto as
 21 Exhibit 1 and incorporated herein (emphasis added in above excerpt).

22 15. These statements and others in the Press Release were knowingly false.
 23 First, as Hyper Ice was well aware, the Theragun G1 was on sale to the public by July
 24 2016—long before the Hypervolt was released in 2018—making Hyper Ice, if
 25 anyone, the "imitator." Second, there is no basis for Hyper Ice's preposterous claim
 26 that the Theragun is a "knockoff" of the Hypervolt. The 2018 version of the
 27 Hypervolt used vibration technology, not percussion, and there has never been any
 28 physical or visual similarity between Therabody's percussive massagers and Hyper
 Ice's massagers, as demonstrated below:



Theragun G1 (released in 2016)



Theragun PRO (released in 2022)



Hypervolt (released in 2018)



Hypervolt 2 (released in 2021)

Third, the connectors used to secure the massage head to the device body in the Therabody products that are said to be “knockoffs” of the Hypervolt devices use completely different mechanisms than the Hypervolt devices. And fourth, the Hyper Ice patent described in the Press Release was issued just *one day before* the Press Release, and there is no evidence that Therabody was even aware of the patent before the Press Release, making it impossible for Therabody to have “misappropriated” Hyper Ice’s allegedly “innovative technology.” In fact, Therabody was issued

1 the '850 Patent, the '490 Patent, and other intellectual property rights long before
2 Hyper Ice obtained its patent, and Therabody filed applications leading to those
3 patents before Hyper Ice began selling its first Hypervolt product.

4 16. Hyper Ice widely distributed the Press Release to the media. For
5 example, the Press Release appeared on Business Wire, Fitt Insider, Athletech News,
6 and Yahoo! Finance. Its dissemination was nationwide, including within the state of
7 California.

8 17. The wide dissemination, including within the state of California, of
9 Hyper Ice's false accusations against Therabody achieved Hyper Ice's intended
10 purpose of damaging Therabody's business, including its business reputation, the
11 reputation of its products, and its existing and prospective business relationships. The
12 brunt of the injury suffered by Therabody occurred in California. Hyper Ice was well
13 aware that this would be the case, considering California is where Therabody is
14 incorporated and maintains its principal place of business.

Hyper Ice's Other Bad Faith Conduct

16 18. In January 2024, Hyper Ice maliciously made false, defamatory
17 statements to Fleet Feet, a Therabody customer, about Therabody and its products,
18 including that Therabody is an “opportunist seeking to knock [Hyper Ice] off” and
19 that Therabody’s percussive massagers are “knockoffs” of the Hypervolt.

20 19. On or about January 27, 2024, at the Boston Run Show trade exposition,
21 Hyper Ice maliciously made false, defamatory statements to Therabody customers
22 and potential customers about Therabody and its products. For example, Hyper Ice
23 representatives approached numerous retailers—customers and potential customers
24 of Therabody—and made statements effectively accusing Therabody of imitating and
25 knocking off Hyper Ice’s products. Hyper Ice representatives also made statements
26 to retailers exhibiting at the exposition that the market “is going to get a lot smaller
27 soon,” implying that Therabody’s ability to sell its percussive massage products
28 would be impaired legally as a result of Hyper Ice’s false allegations.

1 20. On information and belief, the above communications are only
 2 individual examples of a larger concerted campaign by Hyper Ice to directly contact
 3 Therabody customers and prospective customers with false, disparaging comments
 4 about Therabody and its products (including sending copies of the Press Release
 5 directly to such customers and prospective customers) for the purpose of injuring
 6 Therabody's existing and prospective business relationships, and therefore benefit
 7 Hyper Ice in conducting its competing business.

8 21. The injury to Therabody as a result of Hyper Ice's conduct as alleged
 9 herein is and will continue to be substantial. Hyper Ice's Press Release states that,
 10 "[i]n 2023, the massage gun market has been valued at USD 542.6 million and is
 11 expected to reach well over USD 1 billion over the coming years." See Exhibit 1.
 12 Hyper Ice's efforts to gain market share from Therabody, its chief competitor,
 13 through the malicious and knowingly false statements in the Press Release and as
 14 communicated directly to Therabody customers and prospective customers, are
 15 indisputably calculated to benefit Hyper Ice at the expense of Therabody.

16 V. CLAIMS FOR RELIEF

17 **COUNT ONE – Product Disparagement and Trade Libel (15 U.S.C. § 1125(a))**

18 22. This is a claim for product disparagement and trade libel under
 19 15 U.S.C. § 1125(a). The allegations of Paragraphs 1 through 21 above are repeated
 20 and realleged as though fully set forth herein.

21 23. In its commercial advertising, including the Press Release, Hyper Ice
 22 has made, in bad faith, misleading and false representations of fact regarding
 23 Therabody's products.

24 24. In making such false and misleading representations, Hyper Ice acted
 25 intentionally, with knowledge of, and in willful and conscious disregard of
 26 Therabody's rights.

27 25. These misleading and false representations tended to and/or actually
 28 deceived a substantial portion of the intended audience and were material in that these

1 misrepresentations will likely influence Therabody's customers' purchasing
2 decisions.

3 26. Hyper Ice caused its false and misleading representations to enter
4 interstate commerce.

5 27. As a direct and proximate result of the foregoing, Therabody has been
6 and is likely to be further injured by both a diversion of sales from itself to Hyper Ice
7 and by a lessening of the goodwill associated with Therabody's business and its
8 products. The extent of Therabody's injuries are to be determined at trial.

9 28. The damage to Therabody's business, goodwill, and reputation is such
10 as to warrant the trebling of damages under 15 U.S.C. § 1117(a) in order to provide
11 just compensation.

12 **COUNT TWO – False Advertising (Cal. Bus. & Prof. Code § 17500 *et seq.*)**

13 29. This is a claim for false advertising under § 17500, *et seq.* of the
14 California Business and Professions Code. The allegations of Paragraphs 1 through
15 28 above are repeated and realleged as though fully set forth herein.

16 30. In its commercial advertising, including the Press Release, Hyper Ice
17 has made, in bad faith, misleading and untrue representations of fact regarding
18 Therabody's business and products.

19 31. These misleading and untrue representations tended to and/or actually
20 deceived a substantial portion of the intended audience.

21 32. On information and belief, Hyper Ice made its misleading and untrue
22 representations from the State of California and caused these misleading and untrue
23 representations to be disseminated before the public of the State of California.

24 33. Hyper Ice knew, or by the exercise of reasonable care should have
25 known, that its representations regarding Therabody's business and products were
26 misleading and untrue.

27 34. As a direct and proximate result of the foregoing, Therabody has
28 sustained and will continue to sustain substantial injury to its business and reputation.

1 Therabody is entitled to injunctive relief and restitution in an amount to be
 2 determined at trial.

3 **COUNT THREE – Defamation (Common Law)**

4 35. This is a claim for defamation. The allegations of Paragraphs 1 through
 5 34 above are repeated and realleged as though fully set forth herein.

6 36. On January 3, 2024, Hyper Ice maliciously published false, defamatory
 7 statements about Therabody and its products as set forth above. Hyper Ice published
 8 its defamatory statements to third parties including Business Wire, Fitt Insider,
 9 Athletech News, and Yahoo! Finance.

10 37. In January 2024, Hyper Ice maliciously made false, defamatory
 11 statements to Fleet Feet, a Therabody customer, about Therabody and its products as
 12 set forth above.

13 38. On or about January 27, 2024, at the Boston Run Show trade
 14 exposition, Hyper Ice maliciously made false, defamatory statements to Therabody
 15 customers and potential customers about Therabody and its products as set forth
 16 above.

17 39. Hyper Ice's statements were defamatory in that they injured Therabody
 18 in the conduct of its business and deterred prospective customers of Therabody from
 19 doing business with Therabody.

20 40. Hyper Ice's defamatory statements impugned Therabody's business
 21 reputation and its ability to do business, and therefore constitute defamation *per se*.

22 41. As a direct and proximate result of Hyper Ice's defamatory statements,
 23 Therabody has sustained and will continue to sustain substantial injury to its business
 24 and reputation. The amount of Therabody's damages are to be determined at trial.

25 42. Hyper Ice's defamatory conduct is and has been willful, wanton,
 26 malicious, oppressive, and in conscious disregard of Therabody's rights, justifying
 27 the imposition of punitive and exemplary damages under California Civil
 28 Code § 3294.

COUNT FOUR – Trade Libel (Common Law)

43. This is a claim for trade libel. The allegations of Paragraphs 1 through
42 above are repeated and realleged as though fully set forth herein.

44. On January 3, 2024, Hyper Ice maliciously published false statements about Therabody as set forth above. Hyper Ice published its false statements to third parties including Business Wire, Fitt Insider, Athletech News, and Yahoo! Finance.

45. In January 2024, Hyper Ice maliciously made false statements to Fleet Feet, a Therabody customer, about Therabody and its products as set forth above.

46. On or about January 27, 2024, at the Boston Run Show trade exposition, Hyper Ice maliciously made false statements to Therabody customers and potential customers about Therabody and its products as set forth above.

47. Hyper Ice's false statements have financially harmed Therabody in the conduct of its business and deterred prospective customers of Therabody from doing business with it.

48. As a direct and proximate result of the foregoing, Therabody has been injured in its business and property in an amount to be determined at trial.

49. Hyper Ice's conduct is and has been willful, wanton, malicious, oppressive, and in conscious disregard of Therabody's rights, justifying the imposition of punitive and exemplary damages under California Civil Code § 3294.

COUNT FIVE – Tortious Interference with Existing and Prospective Economic Advantage (Common Law)

50. This is a claim for tortious interference with existing and prospective economic advantage. The allegations of Paragraphs 1 through 49 above are repeated and realleged as though fully set forth herein.

51. Therabody has economic relationships with various companies in the health and wellness industry that provide Therabody with the probability of future economic benefit. With knowledge of these relationships and the intent to disrupt them, Hyper Ice wrongfully published and made false statements against Therabody.

1 Hyper Ice's false statements caused the actual disruption of these relationships and,
 2 as a result, economic harm to Therabody.

3 52. As a direct and proximate result of Hyper Ice's intentional interference
 4 with Therabody's existing and prospective economic advantage, Therabody has
 5 sustained and will continue to sustain substantial injury to its economic relationships
 6 with various companies in the health and wellness industry. The amount of
 7 Therabody's damages are to be determined at trial.

8 53. Hyper Ice's conduct is and has been willful, wanton, malicious,
 9 oppressive, and in conscious disregard of Therabody's rights, justifying the
 10 imposition of punitive and exemplary damages under California Civil Code § 3294.

11 **COUNT SIX – Unfair Competition (Cal. Bus. & Prof. Code § 17200)**

12 54. This is a claim for unfair competition under § 17200 *et seq.* of the
 13 California Business and Professions Code. The allegations of Paragraphs 1 through
 14 53 above are repeated and realleged as though fully set forth herein.

15 55. Hyper Ice's acts, as alleged above, constitute unlawful and unfair
 16 business practices in violation of § 17200 *et seq.* of the California Business and
 17 Professions Code.

18 56. As a result of Hyper Ice's statutory unfair competition, Therabody has
 19 sustained and will continue to sustain substantial injury to its business and reputation.
 20 Therabody is entitled to injunctive relief and restitution in an amount to be
 21 determined at trial.

22
 23 WHEREFORE, Therabody prays for judgment against Hyper Ice as follows:

- 24 1. As to Count One, an award of damages, including Therabody's
 25 lost profits, and disgorgement of Hyper Ice's profits, in an amount
 26 to be determined at trial, trebled pursuant to 15 U.S.C. § 1117(a);
- 27 2. As to Count Two, restitution in an amount to be determined at
 28 trial;

- 1 3. As to Counts Three, Four, and Five, an award of compensatory
- 2 damages, and punitive and exemplary damages pursuant to
- 3 California Civil Code § 3294, in an amount to be determined at
- 4 trial;
- 5 4. As to Count Six, restitution in an amount to be determined at trial;
- 6 5. An award of attorneys' fees and costs incurred in bringing this
- 7 action; and
- 8 6. Such other and further relief, including injunctive relief, as may
- 9 be just and proper under the circumstances.

10
11 Dated: February 23, 2024

BRETT J. WILLIAMSON
CAMERON W. WESTIN
O'MELVENY & MYERS LLP

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14 By: /s/ Brett J. Williamson

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16 Brett J. Williamson
17 Attorneys for Plaintiff
18 THERABODY, INC.
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REQUEST FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff Therabody, Inc. hereby requests a trial by jury on all issues so triable.

Dated: February 23, 2024

BRETT J. WILLIAMSON
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